BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AARON BAUGH	)	
Claimant	)	
	)	
VS.	)	
	)	
IMAGE FLOORING, LLC	)	
Respondent	)	Docket No. 1,057,054
	)	
AND	)	
	)	
ACCIDENT FUND INS. CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 14, 2011, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates. Dennis L. Horner, of Kansas City, Kansas, appeared for claimant. Elizabeth R. Dotson, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that Kansas has jurisdiction in this matter in that claimant established he was hired in Kansas. The ALJ further found claimant met his burden of proving he sustained personal injury by accident that arose out of and in the course of his employment and that he gave respondent timely notice of his accident. Respondent was ordered to pay temporary total disability benefits and provide medical treatment with Dr. Basta.

The record on appeal is the same as that considered by the ALJ and consists of the transcripts of the Preliminary Hearing held on November 3, 2011, and continued to November 8, 2011, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether this claim comes within the jurisdiction of the Kansas Workers Compensation Act (Act). Respondent argues the last act of

claimant's employment occurred in Missouri when claimant took and passed his pre-employment physical. In the event the Board finds jurisdiction under the Act, respondent asserts the claim is barred because claimant failed to provide timely notice of his accidental injury in accordance with K.S.A. 44-520.

Claimant argues the last act of his employment occurred in Lenexa, Kansas, when he completed some paperwork on July 19, 2010, after he had taken his pre-employment physical and the results had been received by respondent. Claimant further maintains he reported his injury to the person he believed was respondent's project manager on the day the accident occurred and that respondent's vice president, James Wilkinson, was also aware of his injury.

The issues for the Board's review are:

(1) Does this claim come under the jurisdiction of the Act? Did the last act necessary to form claimant's contract of employment with respondent occur in Kansas?

(2) If so, did claimant give respondent timely notice of his accidental injury?

FINDINGS OF FACT

Claimant, a resident of Missouri, is 36 years old and has been in the flooring business for 25 to 26 years, since he began helping his father as a child. His specialty is the installation of epoxy floors. The job consists of lifting and carrying materials that weigh from 25-30 pounds, squatting, stooping, kneeling, and rotating his back. Before claimant's current accident, he had not suffered previous injury to his low back or left leg. A previous motorcycle accident resulted in injuries to his shoulders and left arm only.

Claimant testified that he was contacted by Bill Fredericks, a salesperson for respondent, and Jim Wilkinson, a vice president of respondent, and was asked to meet with them concerning the possibility of claimant going to work for respondent. An arrangement was made that they would meet on July 16, 2010, in respondent's office in Lenexa, Kansas. At the time of the meeting, Mr. Wilkinson and claimant discussed terms of his employment. Claimant was told he would need to go to OHS Comp Care (OHS) for a pre-employment physical. Claimant traveled to the OHS office in Grandview, Missouri, where the pre-employment physical was performed. Claimant testified that after he took the physical, he returned to respondent's office in Lenexa and talked with Mr. Wilkinson again and met people there in the office. It was not until later that he was told that he had passed the physical. Claimant testified he needed a "fit to work" form from the doctor before he could be accepted by the union and start work. Claimant was at the Lenexa, Kansas, office when he was told he had passed the physical and "everything is good."[1]

[1] P.H. Trans. (Nov. 3, 2011) at 31.

Claimant said he and Mr. Wilkinson spoke again on July 19, 2010, claimant's first day of work. Mr. Wilkinson shook claimant's hand, said "[w]elcome to the family" and gave him a couple of company shirts.[2] Then claimant filled out some paperwork, including a W-4 and I-9, after which claimant went to work. Claimant estimated that 50 to 55 percent of the work he performed for respondent was in Kansas. He reported daily to respondent's office in Lenexa for directions and supervision.

In February 2011, claimant was working at a school in Warrensburg, Missouri, laying an epoxy floor. Claimant was supervising other workers while laying the floor. There was no boss or supervisor over claimant working at the job site. Claimant testified that Bennett Waers was the project manager, and if claimant had a problem on the job, he would report it to Mr. Waers. On February 10, 2011, claimant injured his back. He finished his shift, but when he got home he felt numbness in his left leg, severe pain in his lower back, severe pain down his left leg, and his left foot was falling asleep. Claimant had never had those types of problems before. Claimant testified that before he left the job site on February 10, he reported his injury to Mr. Waers. Claimant told Mr. Waers that he had been troweling the floor and he felt a pop in his back. He also told Mr. Waers that he would be going to see a chiropractor the next day for treatment of the back injury.

The next day, February 11, claimant told Mr. Waers that he would be seeing a chiropractor again the next day and also told him about the arrangements he had made to have the job covered in his absence. Claimant also spoke with Mr. Wilkinson, telling him he had hurt his back but was not sure what he had done. Claimant said he specifically told both Mr. Waers and Mr. Wilkinson he had hurt his back at work. Neither referred claimant for medical treatment, but Mr. Wilkinson gave him an inversion table that his wife had previously used. Claimant said both Mr. Waers and Mr. Wilkinson asked claimant to "tough it out" and continue working in order to finish the school project.[3]

From February 11, 2011, through February 14, 2011, claimant was seen four times by chiropractors, Dr. Sarah Sharp and Dr. Martha Schroeder. On February 22, 2011, claimant was seen by his personal physician, Dr. Damon Travis. Dr. Travis referred claimant to Dr. Steven Charapata for pain management, and claimant was given epidural injections on March 15, March 29 and April 12, with no long-lasting relief. Thereafter, Dr. Travis referred claimant to Dr. Peter Basta, a neurosurgeon. Claimant was initially seen by Dr. Basta on July 15, 2011. He and Dr. Basta discussed surgery, and Dr. Basta gave him some work restrictions.

Claimant said that because he was foreman on the project in Warrensburg, he was in contact with Mr. Waers or Mr. Wilkinson every day, and he let them know when he

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[2] P.H. Trans. (Nov. 3, 2011) at 12.

[3] P.H. Trans. (Nov. 3, 2011) at 18.

needed to be off work for his medical treatment. When claimant returned from his appointment with Dr. Basta, he told them that Dr. Basta wanted to operate on his back, and Mr. Waers gave claimant a formal accident report to fill out. Claimant was told that if he was filing a claim, he would no longer be allowed to work on the project. But since he was the only person who could work on the project, Mr. Waers told him to fill out the accident report, get another physical, and get a work release so he could go back to work. Claimant then went to OHS but, after waiting there for several hours, he was told to leave. He then spoke with Mr. Waers again, who told him nothing could be done since he had seen a specialist. Claimant was unable to perform his job because of his restrictions. After that, claimant worked awhile but was told to have the other employees do the heavy work. Claimant's last day at work for respondent was in August 2011.

Claimant acknowledged the first time he told either Mr. Waers or Mr. Wilkinson he wanted workers compensation benefits was in July 2011, after he found out he would not get paid while he was off work after back surgery. Before that, he had turned in the expenses of his medical treatment to his private health insurance carrier. Claimant denied being at any meeting at respondent in which workers compensation was discussed and also denied being aware of what needed to be done in order to file a workers compensation claim. He was not aware of any postings in respondent's office about workers compensation procedures.

Bennett Waers is an apprentice installer for respondent. Most of the time, he worked on epoxy flooring. In February 2011, he was working in Warrensburg, Missouri, at the school project. He testified that as an apprentice installer, he was not claimant's supervisor. Both he and claimant reported to Mr. Wilkinson. In March 2011, Mr. Waers was given a promotion to project manager.

Mr. Waers testified that claimant did not show up at work one day, and he found out that the day before claimant had hurt himself and that claimant had gone to the chiropractor. Claimant later told Mr. Waers he had rolled out a floor and all of a sudden his back started hurting. Claimant continued to work on the job in Warrensburg until the job was finished, another couple of months. During that time, claimant occasionally mentioned that his back was hurting. Mr. Waers was aware that claimant took off time after February to see doctors, but he was not certain who was in charge during the times claimant was gone.

Mr. Waers testified that at some point he told Mr. Wilkinson that claimant had hurt his back and was taking off work to see the doctor. He does not remember when this conversation was held.

Mr. Wilkinson is respondent's vice president. He testified that respondent was looking for an installation manager and claimant's name came up. He and claimant had numerous telephone conversations and claimant came into the office in Lenexa. Eventually the decision was made that respondent wanted to hire claimant and everything

was dependent upon him getting his fit-to-work physical. Claimant was sent to OHS in Grandview, Missouri, for the physical. Mr. Wilkinson said that once claimant reported for his evaluation at OHS, he had done everything he needed to do to accept the offer of employment. Mr. Wilkinson received an email from OHS on July 19, 2010, indicating claimant had passed the physical. Mr. Wilkinson acknowledged that claimant signed various paperwork, including a W4 form, a payroll deduction authorization and a Kansas Employees Withholding Allowance Certificate on July 19, 2010.

Mr. Wilkinson said claimant's position at respondent was manager of installation for the resinous business. Claimant's position was supervisory in nature. He was responsible for payroll, attending safety meetings, workers compensation claims on jobs, and for the reporting of the employees on the jobs. Mr. Wilkinson said claimant would have gone through numerous opportunities to be trained on what to do in case of a workers compensation situation. Workers compensation would have been covered in every monthly meeting, and someone would have gone over it with him as a new employee, especially since he would be in a supervisory role.

Mr. Wilkinson said claimant was paid hourly but had an agreement with respondent that he would be paid for 40 hours per week. He tracked the time claimant worked on various projects in Kansas and Missouri and said claimant worked in Kansas 33 percent of the time, in Missouri 56 percent of the time, and 11 percent of the time he was not on the job.

Mr. Wilkinson testified that Mr. Waers was not a supervisor over claimant in February 2011. Later Mr. Waers became a project manager. Even then, Mr. Wilkinson said Mr. Waers was not in a supervisory capacity over claimant, although Mr. Waers helped claimant in some supervisory capacities. Mr. Wilkinson said if claimant had any job-related or crew-related problems, such as needing more product or scheduling workers, he would have gone to Mr. Waers. If claimant had a question about his job duties or pay or needed to file for workers compensation, he would have gone to Mr. Wilkinson.

Mr. Wilkinson said that around February 10, 2011, claimant told him he had been in a motorcycle wreck and it had caused him problems for years. Mr. Wilkinson could not remember when, but at some point claimant told him he was seeking treatment. Mr. Wilkinson said he asked claimant if the problem was work related, and claimant said it was not related to work but was caused by the previous motorcycle accident. Mr. Wilkinson said at some point, claimant told him he would like to try an inversion table. Mr. Wilkinson told claimant his wife had an inversion table and he was welcome to borrow it. Claimant went to Mr. Wilkinson's home and Mr. Wilkinson's wife helped claimant load it into his truck. While claimant was at Mr. Wilkinson's home, he never mentioned that he thought he had injured his back at any of his jobs at respondent.

Mr. Wilkinson said he and claimant saw each other a couple times a week to discuss the work on the job sites. Claimant told Mr. Wilkinson numerous times he had to

take off work, that his back issue had been bothering him forever, and that he was seeing his personal doctor about it. Mr. Wilkinson said he had numerous conversations with claimant as to whether his back issue was work-related, and claimant assured him it was not and that he was able to do his job. He denied claimant told him he had hurt his back but only said his back was hurting. Mr. Wilkinson also denied Mr. Waers ever told him that claimant had hurt his back on the job.

Mr. Wilkinson said sometime in July 2011, claimant returned from a meeting with the surgeon. Claimant sent Mr. Wilkinson an email saying he was going to need surgery and was considering turning in a workers compensation claim because his private insurance would not pay him for being off work after the surgery. Mr. Wilkinson testified this was his first notice that claimant was planning to file a workers compensation claim. He said he was on vacation at the time, and Mr. Waers gave claimant the accident forms to fill out. Claimant filled out the forms, which were dated July 29, 2011.

PRINCIPLES OF LAW

The Workers Compensation Act applies to work-related accidents sustained outside the state when the employment contract is made within the State of Kansas, unless the contract otherwise specifically provides.

> . . . That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: . . . [4]

In the case of *Chapman,*[5] the Supreme Court of Kansas reaffirmed the state's policy of liberally construing the Kansas Workers Compensation Act for the purpose of bringing employers and employees within its provisions and to provide the protections of the Act to both, citing K.S.A. 44-501(g).

In *Shehane*,[6] the Kansas Court of Appeals held:

> The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks

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[4] K.S.A. 44-506.

[5] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 655, 907 P.2d 828 (1995).

[6] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973) . . .

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

Claimant was hired at respondent's Lenexa, Kansas, office, not at the physician's office where he took the "pre-employment" physical. After a telephone call or calls, claimant met with Mr. Wilkinson at respondent's office in Lenexa, Kansas. It was apparent to claimant that he had the job as a result of that meeting. Nevertheless, he understood that the job offer was conditioned upon claimant passing a physical examination. After the physical examination, claimant again met with Mr. Wilkinson at respondent's Lenexa, Kansas, office, where he completed some additional paperwork and was told he was hired. Whether the physical examination was a condition precedent or a condition subsequent to the job offer, claimant was hired in Kansas. If it was a condition subsequent, the last act

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2010 Supp. 44-555c(k).

necessary to complete the employment contract was done at the first meeting at respondent's Kansas office. If the physical was a condition precedent, the contract of hire was completed during the subsequent meeting between claimant and Mr. Wilkinson at the Kansas office when claimant was informed he had passed the physical examination, he was welcomed to the "family," and the final paperwork was then completed. Kansas has jurisdiction of this claim, and the Act applies.

The ALJ apparently found claimant credible because she had to accept claimant's testimony to find claimant's accident and injury arose out of and in the course of his employment with respondent and that he gave timely notice. In finding the claim to be compensable, the ALJ must have believed claimant's testimony over the testimony of Mr. Wilkinson. Having read the record compiled to date, this Board Member agrees with the findings and conclusions of the ALJ.

CONCLUSION

(1) The Kansas Workers Compensation Act applies to this claim.

(2) Claimant gave respondent timely notice of his accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Marcia L. Yates dated November 14, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates, Administrative Law Judge